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No. 73-1088

In the Supreme Court of the United States

OCTOBER TERM, 1973

LIFE OF THE LAND, ET AL., PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1-30) is reported at 485 F. 2d 460. The order of the court of appeals denying the petition for rehearing *en banc* is set forth at Pet. App. B, 31-32. The decision and order of the district court (Pet. App. C, 33-42) on the motion for a preliminary injunction are reported at 363 F. Supp. 1171. The final decision and order of the district court are set forth at Pet. App. D, 43-44.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1973. A timely petition for rehearing *en banc* was unanimously denied by that court on October 16, 1973. The petition for a writ of certiorari was filed on January 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case was adequate.

2. Whether utilization of the resources of the State and an independent consulting firm in preparation of an environmental impact statement, with full participation by and under the control of the responsible federal officials, is permissible under the National Environmental Policy Act.

STATUTES INVOLVED

The relevant statutes involved are set forth in an appendix to the petition for certiorari (Pet. App. E, 45–48).

STATEMENT

Petitioners brought this action for injunctive relief to block construction of the Reef Runway project at the Honolulu, Hawaii, International Airport on the grounds that the federal defendants had failed to comply with certain requirements of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, and the Airport and Airway De-

velopment Act of 1970 (AADA), 84 Stat. 219, 49 U.S.C. 1701 *et seq.* Specifically, petitioners claimed that the respondents had violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), because the Environmental Impact Statement (EIS) prepared for the project did not adequately discuss certain alternatives to the proposed action; that the respondents had not complied with Section 16(c)(4) of AADA, 49 U.S.C. 1716(c)(4), in making the finding that no feasible and prudent alternative exists and that all feasible steps had been taken to minimize adverse effects; and that the respondents had impermissibly delegated the preparation of the EIS to a private consulting firm which had a financial interest in the project.

Honolulu International Airport (HIA), site of the Reef Runway project, has a unique role as an airport serving a number of essential interests. Because more than 99 percent of all passengers to and from the State travel by air, it is Hawaii's principal gateway (Pet. App. A, 5). It is also the Nation's third largest point of entry for international arrivals (*ibid.*), with scheduled overseas service by 20 air carriers. For Hawaiians, air cargo operations are vital during periods of labor disputes involving marine transport. The airport has also been essential for United States Air Force operations since the adjacent Hickam Air Field was closed.[1]

[1] In fiscal year 1971, the Air Force accounted for 52,221 operations (a landing or a take-off) of the more than 250,000 operations at HIA (Pet. App. A, 5).

With the advent of jet aircraft operations at HIA in the early 1960's, a growing public concern developed over the problems of jet noise pollution and potential aircraft disasters. Because of the close proximity of the airport, and the attendant flight paths, to several densely populated residential areas and the downtown Honolulu business district, planning efforts were centered on developing a solution that would move the aircraft flight paths seaward, away from human habitation. After eight years of examining a number of proposed solutions, a state task force recommended, in February 1970, that the Reef Runway be constructed at the airport (Pet. App. A, 6–9).

The Reef Runway project involves the construction of a new 12,000-foot runway that would be located parallel to and 6,700 feet south of the existing main runway. It would be constructed on filled reefland in the Keehi Lagoon in Mamala Bay. Those areas are now scarred from three 10,000-foot seaplane runways cut by the Navy during World War II, and are also polluted by the daily discharge of 55 million gallons of raw sewage from the City and County. The reef runway would largely eliminate the possibility of a disastrous aircraft accident in the densely populated residential areas adjacent to the existing main runway [2] and would also reduce noise pollution by moving it more than a mile away.

[2] Public concern over a jet aircraft mishap may be somewhat sharpened by the fact that the Air Force frequently uses HIA for operations of its KC–135 aircraft, a jet tanker capable of holding 160,000 pounds of jet fuel.

In connection with the proposed project, the State of Hawaii expended almost one million dollars on various engineering and environmental studies. These studies examined the effect of the runway on birds, fish, marine life, and water quality. Because it appeared that the project would have an adverse impact on a portion of the roosting area used by the endangered Hawaiian Stilt, work is now underway to relocate these birds to one new and one improved habitat at a cost in excess of $350,000 (Pet. App. A, 27–28).

In order to fund the Reef Runway project, the State applied to the Federal Aviation Administration for a matching grant under the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* Accordingly, the FAA, in December 1970, began to prepare an Environmental Impact Statement on the proposed project. For assistance in the preparation of the EIS, the Ralph M. Parsons Company, a private consulting firm, was engaged. Several state employees also assisted the federal officials in the preparation of the document. The final EIS was approved by the regional director of the FAA as required by Section 16(c) of AADA. On January 21, 1972, the EIS was sent to agency headquarters and, after further review, to the Department of Transportation's Assistant Secretary for Environment and Urban Systems, where it was approved for filing with the Council on Environmental Quality on February 29, 1972.

Both the court of appeals and the district court rejected petitioners' numerous attacks upon the adequacy of the EIS. Both courts found no illegality in

the assistance rendered by the private consulting firm to the FAA in the preparation of the EIS. Furthermore, both the district court and the court of appeals held that the finding by the Secretary of Transportation pursuant to Section 16(c)(4) of AADA, that no feasible and prudent alternative exists, is supported by the record.

ARGUMENT

1. The determination by the court of appeals that the Environmental Impact Statement adequately sets forth alternatives to the proposed action is primarily a factual matter grounded in the record before the district court. Further review of that essentially factual issue by this Court is not warranted.

In response to petitioners' claims that the FAA had impermissibly ignored several viable alternatives to construction of the Reef Runway in its preparation of the EIS, the district court heard testimony by "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 420. After an extensive hearing on these alleged deficiencies of the EIS, the district court found that there was no basis for requiring discussion in the EIS of the matters urged upon the agency by petitioners. The court of appeals agreed and filed a comprehensive opinion carefully evaluating each of petitioners' claims. Contrary to their assertion that they had "demonstrated at trial that a variety of such reasonable 'non-construction' alternatives exist" (Pet. 8), the court of appeals found no support in the record to indicate that any of the alternatives proposed by petitioners

were either reasonable or feasible.[3] The refusal by the court of appeals to find that these alleged omissions had compromised the adequacy of the environmental analysis is a proper interpretation of the requirements of NEPA.

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities * * *.

Natural Resources Defense Council, Inc. v. *Morton*, 458 F. 2d 827, 837–838 (C.A. D.C.).

2. There is no real conflict among the circuits as to the applicable standards for review of the contents of a NEPA statement. In quest of a conflict, petitioners have lumped together cases challenging agency decisions not to prepare any impact statement at all,[4] with

[3] Specifically, the court rejected petitioners' suggestion that the Air Force shift operations or its heavy jet tanker to another island because the Air Force had already refused to do so (Pet. App. A. 22). Higher landing fees were rejected because that scheme had proven unsuccessful elsewhere (Pet. App. A. 23). Also, the court rejected such proposed alternatives as altering airline schedules, imposition of curfew restriction and conversion to wide-bodied aircraft because there was nothing in the record to indicate that such proposals could alleviate the problems which the Reef Runway was designed to cure.

[4] See, *e.g.*, *Hanly* v. *Kleindienst*, 471 F. 2d 823 (C.A. 2), certiorari denied, 412 U.S. 908; *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463 (C.A. 5); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244 (C.A. 10); *Scientists' Institute Information, Inc.* v. *Atomic Energy Commission*, 481 F. 2d 1079 (C.A. D.C.).

cases attacking the adequacy of an EIS,[5] and cases questioning the final agency action based on its consideration of the EIS.[6] Not surprisingly, the courts have concluded that different standards of review should be applied to these quite different situations. On the other hand, in cases of the type presented here, involving the adequacy of an impact statement, the decisions have been basically consistent.

The courts of appeals have consistently held that judicial review of the "substantive" agency decision, if available at all, is governed by the "arbitrary" and "capricious" standard of 5 U.S.C. 706(2)(A). *E.g., Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1281 (C.A. 9); *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A.D.C.); *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465–466 (C.A. 5).

By contrast, the adequacy of the contents of impact statements has been more closely reviewed by the courts, under a standard of "reasonableness." *E.g., Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 834 (C.A.D.C.); *National Helium Corporation* v.

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[5] See, *e.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Iowa Citizens* v. *Volpe*, 487 F. 2d 849 (C.A. 8); *Environmental Defense Fund* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), petition for a writ of certiorari pending, No. 73–1179; *National Helium Corporation* v. *Morton*, 486 F. 2d 995 (C.A. 10), petition for a writ of certiorari pending, No. 73–1120.

[6] See, *e.g.*, *Conservation Council* v. *Froehlke*, 473 F. 2d 664 (C.A. 4); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (C.A. 8), certiorari denied, ~~407~~ 412 U.S. ~~1072~~ 931; *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7).

Morton, 486 F. 2d 995 (C.A. 10), pending on petition for a writ of certiorari, No. 73–1120.

In the present case the court of appeals was concerned with only the issue of whether the content of the impact statement was adequate. While there is concededly some language in the opinion to suggest otherwise, it appears that the court of appeals applied the reasonableness standard used in all other circuits. Thus the court said that the impact statement's discussion of alternatives to the proposed action "is subject to a construction of reasonableness" and that it "need only set forth those alternatives 'sufficient to permit a reasoned choice'" (Pet. App. A, 24).[7]

But whatever the articulated standard (see note 7, *supra*), the courts—including the panel below—have reviewed impact statements in essentially the same way. The claims of alleged non-compliance with

[7] The court's opinion does, however, to some extent confuse the standard to be applied to the substantive agency decision with the standard to be applied to reviewing the contents of a NEPA statement. It, for example, speaks generally of applying the arbitrary and capricious standard to the "Substantive Content of the EIS" (Pet. App. A, 17). However, in considering specific objections to its contents, the court applied a standard of reasonableness. The court's semantic confusion here has subsequently been clarified. In *Lathan* v. *Volpe*, Nos. 72–2932 and 72–2974, decided December 7, 1973, a different panel of the Ninth Circuit pointed out the mistaken formulation in the opinion here, but observed that it could not have affected the decision (slip op. p. 4):

"* * * In *Life of the Land* v. *Brinegar*, 9 Cir., 1973 * * * we quoted *Jicarilla Apache Tribe*, *supra*, regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA. This appears to be a misreading of *Jicarilla Apache Tribe*, but our reading of *Life of the Land* convinces us that the result would

NEPA have been measured against the agency's record (the EIS) and whatever evidence may have been adduced at trial. Here, the petitioners were given an opportunity in an extensive hearing before the district court to show why the claimed exclusion of certain material from the EIS rendered that document defective, and they were unable to show any error.[8]

3. In attempting to find a conflict between the decision below and that of the Second Circuit in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, certiorari denied, 409 U.S. 849, petitioners ignore the limited role assigned here by the responsible federal officials to the employees of the State and the Parsons Company in the task of writing the EIS. As noted by the court of appeals (Pet. App. A, 13–14), there was neither a delegation of authority nor abdication of responsibility in the preparation of

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be no different if we had thought that § 706(2)(D) applied." We submit that to the extent that there is a "conflict" in the formulation of applicable standards, it is a conflict *within* the Ninth Circuit, and one that that Circuit is in the process of resolving. No intervention by this Court is needed on that ground alone. Moreover, as we argue in the text, *supra*, however the standards are articulated, the extent of review and the result reached here were wholly proper.

[8] Petitioners' claim that requiring them to bear the burden of proof violated "the spirit of" NEPA is not properly based on the district court decision petitioners quote (Pet. 17–18) or on any other authority. In the sentence following the one quoted by petitioners, the court made clear that it was speaking only of the burden on an agency "once a prima facie showing has been made that the Federal agency has failed to adhere to the requirements of NEPA * * *." *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1335 (S.D. Tex.), appeal pending, C.A. 5, No. 73-2745.

the document. Rather, employees of the State and of Parsons participated with the FAA in writing the EIS. Beyond this cooperative team effort, the FAA remained in control of the process and the product, requiring revisions to it in the region and also in Washington (Tr. 298, 752–757). Thus, participation by non-federal employees did not taint the ultimate work product.[9] This is not the situation condemned by the Second Circuit in *Greene County, supra,* where that court found (455 F. 2d at 420):

> The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and once again to act as an umpire.

Moreover, while compliance with Section 102 of NEPA requires good faith objectivity, it does not require subjective impartiality. *Environmental Defense Fund* v. *Corps of Engineers,* 470 F. 2d 289, 296 (C.A. 8). The record in this case shows that such objectivity was maintained by the FAA throughout the preparation of the EIS.

4. Pursuant to Section 16(c)(4) of the Airport and Airway Development Act of 1970, the Secretary

[9] At trial, the respondents acknowledged that the Parsons Company did have an agreement "to render management consultant services for the engineering, design and construction of the Reef Runway project" (Pet. App. A. 13). However, the FAA requested Parsons to assist it because of the expertise gained by the company in preparing a master plan for the airport in 1968.

found that there is no feasible and prudent alternative to the requested action which has not been considered, and that all possible steps had been taken to minimize any resulting adverse effects. The public record offered in support of that finding is the EIS. Petitioners' attack upon that finding, and their claim that the opinion below stands in conflict with this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, is subject to the same infirmities which pervade their other arguments. Alternatives to the proposed action which are unrealistic or unreasonable in the context of a NEPA analysis are no more feasible or worthy of consideration when making the Section 16(c)(4) finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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